APPENDIX A

Opinion of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R. R. Co. et al. v. United States, et al.*, Civil Action No. 56-232-W, dated May 17, 1956:

Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp., for temporary authority under Sec. 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. Sec. 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp., to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp., to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in Sec. 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by Sec. 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States*, 122 F.

Supp. 955 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in Sec. 210a(b) of the Interstate Commerce Act (49 U. S. C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States, supra.*

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set side and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge.* I concur exclusively on the ground that I always defer to an earlier decision by my brethern, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States*, D. Mass., 122 F. Supp. 955 (1954), I should conclude that, by virtue of Sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

APPENDIX B

Opinion of the United States District Court for the District of Massachusetts in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955, 1954:

HARTIGAN, Circuit Judge

This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321, through 2325, inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Co. Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co. Inc. St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C., made a motion for an order granting it judgment on the pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. A. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 310a(b), to conduct opera-

tions for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a(b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. §§ 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the December 18, 1951 and June 3, 1952 orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953 order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954 and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951 as amended by the order entered on June 3, 1952 was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period exceeding 180 days. The plaintiff argues that under the

provisions of Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 301a(b), the Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants, on the other hand, contend that by the third sentence of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1008(b). St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a(b) of the Interstate Commerce Act and of Section 9(b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9(b) does not apply to a temporary approval granted by the Commission under Section 210a(b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9(b) of the Administrative Procedure Act. Under the provisions of Section 210a(b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9(b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal of the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license per-

mitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9(b) and does not have the right by virtue of that statute to lease Hinsch's operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9(b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Act gives the following explanation of Section 9(b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d. Sess., entitled "Administrative Procedure Act, Legislative History 79th Congress".

Said Ohio Act referred to the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class,

or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency". (Italics ours.)

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a(b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9(b) repeals Section 210a(b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351; *United States* v. *Jackson*, 1938, 302 U.S. 628, 58 S.Ct. 390, 82 L.Ed. 488; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 1882, 106 U.S. 596, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251. There must be a "positive repugnancy between the provisions of the new laws and those of the old". *Wood* v. *United States*, 1842, 16 Pet. 342, 363, 10 L.Ed. 987. We find no such repugnancy between the provisions of §§ 210a(b) and 9(b). Section 210a(b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of §§ 9(b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both

statutes covering the same general subject matter. *United States* v. *Borden Co., supra.*

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administrative Procedure Act, 5 U. S. C. A. § 1011, published its interpretation of the third sentence of Section 9(b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a(b). The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 1892, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134; *U.S.* v. *America Trucking Assn's*, 1940, 310 U.S. 534, 60 S. Ct. 1059, 84 L.Ed. 1345. But, because the provisions of §§ 210a(b) and 9(b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulations." *Koshland* v. *Helvering*, 1936, 298 U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268; See *Alaska Steamship Co.* v. *U.S.*, 1933, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 532; *Social Security Board* v. *Nierotko*, 1946, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718. ". * * * Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a(b), *United States* v. *Mo. Pac. R. Co.*, 1929, 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322.

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

APPENDIX C

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 28th day of October, A.D. 1955

No. W-376 (*Sub-No. 11*)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade

No. W-376 (Sub-No. 12)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade (2)

It appearing, That by order of May 18, 1955, the Commission, Division 4, granted Pan-Atlantic Steamship Corporation, temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passenger and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda Stockton and Los Angeles Harbor.

It further appearing That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 13) seeks a certificate of public

convenience and necessity; and good cause appearing therefore:

It is ordered, That said carrier be, and it is hereby authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub. No. 13) has been finally determined.

By the Commission, Division 4.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX D

Excerpts From Cited Statutes and Regulations

(1) *Interstate Commerce Act*

Section 210a (49 U. S. C., Sec. 310a)

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings,

grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

Section 311. (49 U. S. C., Sec. 911)

(b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease, or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

(2) *Administrative Procedure Act*

Section 12. (5 U. S. C., 1011)

Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to super-

sede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

(3) *Second War Powers Act of 1942* (56 Stat. 177, March 27, 1942)

Section 102. Subsection (a) of section 210 of said Act, as amended (U. S. C. 1940 ed., Title 49, section 310a(a)), is hereby amended by striking out the words "but for not more than an aggregate of one hundred and eighty days."

Section 103. Subsection (a) of section 311 of said Act, as amended (U. S. C. 1940 ed., Title 49, section 911(a)), is hereby amended by striking out the words "but not for more than an aggregate of one hundred and eighty days."

Section 1501. Titles I to IX inclusive and Titles XI to XIV of this Act, and the amendments to existing law made by any such title shall remain in force only until December 31, 1944, or until such earlier time as the Congress by concurrent resolution, or the President, may designate, and after such amendments cease to be in force any provision of law amended thereby shall be in full force and effect as though this Act had not been enacted; but no court proceedings brought under such title shall abate by reason of the termination thereunder of such title.

(4) *Amendment to Second War Powers Act* (60 Stat. 345, June 29, 1946)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Title XV, section 1501, of the Second War

Powers Act, 1942, approved March 27, 1942, as amended, is amended to read as follows:

Section 1501. Titles I to IV, V, VII, and XIV, of this Act, and the amendments to existing law made by any such title, shall remain in force only until March 31, 1947, or, until such earlier time as the two Houses of Congress by concurrent resolution, or the President may designate, and Title III of this Act, and the amendments to existing law made by such title, shall remain in force only until March 31, 1947, except that for purposes of allocations of building materials, and facilities related to the utilization of building materials, such Title III, and the amendments to existing law made by such title, shall remain in force until June 30, 1947, or until such earlier time as the two Houses of Congress by concurrent resolution, or the President, may designate, and after such amendments cease to be in force, any provisions of law amended thereby shall be in full force and effect as though this Act has not been enacted; but no court proceedings brought under any such title shall abate by reason of the termination hereunder of such title.

(5) *Interstate Commerce Commission Rules* (49 C. F. R. 2.1-2.4)

Section 2.1 *Extension of Temporary Operating Authority or Approval.* The Commission will determine upon written request by any interested party, or it may determine upon its own initiative, whether under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)):—

(a) any temporary operating authority granted under 210a(a) or 311(a) of the Interstate Commerce Act (49 U. S. C. 310a(a), 911(a)) is continued in force, beyond the expiration date specified in such temporary operating authority until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a per-

mit to engage in operations authorized by such temporary operating authority.

(b) Any temporary approval granted under Section 210a(b) or 311(b) of the Interstate Commerce Act (49 U. S. C. 310a(b), 911(b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days prior to expiration of the temporary operating authority or approval.

Section 2.2 *Definitions and Interpretations.* In making the determination provided in Section 2.1, the Commission will be guided by the following interpretations of the provisions of the 3rd sentence of Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)), and of the provisions of Section 210a(a) of the Interstate Commerce Act (49 U. S. C. 310a(a)):

(a) "Timely Application."—An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) "Sufficient Application."—An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) "Aggregate of 180 days."—As used in Section 210a(a) of the Act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that Section of the Act to meet a continuing need for a particular service.

(d) "Series of grants."—As relates to extensions of temporary authorities under Section 9(b) of the Administrative Procedure Act [5 U. S. C. 1008(b)], only those grants of temporary authority for less than 180 days which have been approved to meet a specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) "Need considered not to be of a continuing nature."—Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) "Final determination of Application."—For the purpose of this Section—

(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water

carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the order approving such application becomes effective.

Section 2.3 *Additional Grant for New Need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.

Section 2.4 *Termination of Temporary Authority or Approval.* Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)).